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NURO DAGANGAN SDN BHD v. BANK KERJASAMA RAKYAT MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
YUSRIN FAIDZ YUSOFF JC
[ORIGINATING SUMMONS NO: WA-24M-22-08-2023]
5 JULY 2024

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Abstract – *The role of the Shariah Advisory Council, appointed by Bank Negara, is limited to providing guidance on Shariah compliance. It does not have the authority to make binding decisions regarding the financial liabilities of borrowers. This responsibility remains with the court, specifically the presiding judge, who evaluates the evidence and legal arguments presented in the case to make a final ruling on the borrower's liability.*

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BANKING: *Islamic banking – Financing facility – Borrower received financing facilities from bank – Facilities under principles of bai al-inah and murabahah – Creation of charges over borrower's properties as securities for financing facilities – Borrower failed to make payments to bank – Bank issued 16D notice pursuant to s. 254 of National Land Code to commence foreclosure proceedings against charged properties – Declaration sought by borrower to invalidate charges on properties – Argument that financing facilities not compliant with Shariah principles – Whether financing facilities contradicted Shariah principles – Whether court must enforce Shariah Advisory Council's rulings without exercising its own judicial discretion based on statutes and common law*

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LAND LAW: *Charge – Validity – Borrower received financing facilities from bank – Facilities under Islamic banking principles of bai al-inah and murabahah – Creation of charges over borrower's properties as securities for financing facilities – Borrower failed to make payments to bank – Bank issued 16D notice pursuant to s. 254 of National Land Code to commence foreclosure proceedings against charged properties – Declaration sought by borrower to invalidate charges on properties – Argument that financing facilities not compliant with Shariah principles – Whether charges valid – National Land Code, ss. 241 & 256(3)*

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The plaintiff borrower applied for and received the following financing facilities from the defendant bank: (i) Term Financing-i facility based on the *bai al-inah* principle for the amount of RM892,800; and (ii) Term Financing-i (Restructuring) facility based on the *murabahah* principle (with the application of *tawarruq*) for the amount of RM2,665,000. It was agreed between parties that one of the securities for the financing facilities was the creation of charges over the plaintiff's properties. After obtaining and utilising the financing facilities, the plaintiff failed to make the agreed-upon payments to the defendant. As a result, the defendant filed a civil suit against

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the plaintiff ('Suit 841'). The defendant's application for summary judgment was dismissed. Meanwhile, in the exercise of their rights under the charges created, the defendant issued a 16D notice pursuant to s. 254 of the National Land Code ('NLC') in order to commence foreclosure proceedings against the charged property. Just two days after the dismissal of the summary judgment in Suit 841, the plaintiff filed this originating summons ('encl. 1') seeking for a declaration to invalidate the charges on their properties. In essence, the plaintiff submitted that the *bai al-inah* financing facility was not compliant with Shariah principle. The plaintiff argued that: (i) the asset sale and asset purchase agreement ('ASAPA') were executed at the same time; (ii) the ASAPA contained the prescribed condition to purchase the asset; (iii) the ASAPA did not identify the subject matter of the agreement; (iv) the disbursement notice within the asset purchase agreement contained missing items with places left blank; and (v) Appendix 1 within the asset sale agreement was left blank, *ie*, without any proof of the transacted commodities. This, according to the plaintiff, ran contrary to, *inter alia*, the rules and guidelines published by the Shariah Advisory Council ('SAC') appointed by Bank Negara as well as the general Islamic principle against *gharar* (uncertainty). In contrast, the defendant contended that the facilities included not only *bai al-inah* buat also *murabahah* facilities, encompassing a larger loan sum. The issues that arose were: (i) whether the financing facilities contradicted Shariah principles; and (ii) must the court enforce the SAC rulings without exercising its own judicial discretion based on statutes and common law.

Held (dismissing application in encl. 1):

(1) On the issues of: (i) sequence of agreement of the first facility agreement, the SAC rulings only required the sale and purchase contract be executed at different times. It did not prohibit the *akad* to be entered on the same day. Based on the time of signing of each document, although both agreements were executed on the same day, the asset sale agreement was executed at 10.29am whilst the asset purchase agreement was executed at 10.35am. As such, the first facility agreement was in compliance with the SAC ruling for it to be executed at different times; (ii) the disbursement notice with the asset purchase agreement of the first facility agreement which was said to contain missing items (places left blank), such disbursement notices was only a sample to be adopted by the plaintiff. The actual disbursement notice which was issued under the plaintiff's own letterhead had been provided in exh. MA-7 of encl. 37 in Suit 841; (iii) the lack of proof of transacted commodities in Appendix 1 within the asset sale agreement of the first facility agreement, the defendant had sufficiently provided the relevant proof of Bursa Malaysia's commodity transactions in exh. MA-6 of encl. 37 in Suit 841. Therefore, such allegation of *gharar* over the issue of commodity was unfounded; and (iv) incomplete documents being part of the second facility agreement, these documents were mere samples

within the said master facilities agreement and therefore were meant to be as a guide in the preparation of the actual document. Equally, there was no element of *gharar* over those 'incomplete' documents. The plaintiff's current assertion of the defendant's non-compliance with Shariah principles appeared to be an afterthought aimed at stalling the foreclosure action against them, as well as a collateral attack to defeat the defendant's claim in Suit 841. (paras 21, 23-25 & 28)

(2) The SAC rulings are confined only to Shariah issues, with the presiding judge retaining the judicial power to decide on the borrower's liability based on evidence and applicable laws. The law applicable to the contemplated foreclosure proceeding was based on the NLC. Section 241 of the NLC gives banks and financial institutions the power to charge the property subject to the loan and this shall take effect upon registration of such charge. When there is a charge, the chargee will have a legal interest in the land while the chargor retains ownership of the land. The chargee would hold the original title to the land and shall return it once the loan has been fully repaid. However, if the chargor has breached any conditions within the charge instrument, the chargee may apply for an order for sale of the charged property. Even if the plaintiff was successful in showing non-compliance of Shariah principles or SAC rulings, such non-compliance would not automatically amount to cause to the contrary under s. 256(3) of the NLC. (paras 33, 34 & 48)

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd [2006] 8 CLJ 9 HC ***(refd)***

Bank Kerjasama Rakyat (M) Bhd v. Koperasi Serbaguna Iman Malaysia Bhd [2020] CLJU 389; [2020] 1 LNS 389 HC ***(refd)***

Bank Muamalat Malaysia Bhd & Ors v. Redha Resources Bhd & Ors [2016] CLJU 1156; [2016] 1 LNS 1156 CA ***(refd)***

Citranet Sdn Bhd v. Kuwait Finance House (M) Bhd [2016] CLJU 908; [2016] 1 LNS 908 HC ***(refd)***

FLH ICT Services Sdn Bhd & Anor v. Malaysian Debt Ventures Bhd [2016] 1 CLJ 243 CA ***(refd)***

JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners) [2019] 5 CLJ 569 FC ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Malayan Banking Bhd v. Ya'kup Oje & Anor [2007] CLJU 451; [2007] 1 LNS 451 HC ***(refd)***

Maybank Islamic Bhd v. Golden Base Construction Sdn Bhd & Ors [2019] CLJU 1785; [2019] 1 LNS 1785 HC ***(refd)***

Maybank Islamic Bhd v. Golden Base Construction Sdn Bhd & Ors (W-02(IM)(MUA)-1035-06-2019) (Unreported) ***(refd)***

Maybank Islamic Bhd v. M-IO Builders Sdn Bhd & Anor [2017] 7 CLJ 127 CA ***(refd)***

Legislation referred to:
Central Bank of Malaysia Act 2009, ss. 56(1)(b), 57
Contracts Act 1950, ss. 24, 30
Evidence Act 1950, s. 45
Federal Constitution, Ninth Schedule List 1 item 7(j)
Islamic Financial Services Act 2013, ss. 28(5), 29, 135, 281
National Land Code 1965, ss. 241, 254, 256(3)

Other source(s) referred to:
Budiman, I K, Abdulaziz M, Jaffar A & Lo, M T, *Impacts of the Islamic Financial Services Act 2013 on Investment Account products offered*, Islamic Banks in Malaysia, Vol 6, No 4, pp 317-327

For the plaintiff - Mugunthan Vadiveloo & Mohammed Nasser Yusof; M/s The Law Chambers of Fauzi & Nasser
For the defendant - Ku Amirul Faiz Ku Seman & Nik Suraya Nadhira Abd Rahim; M/s Kama & Wan

Reported by Lina E

JUDGMENT

Yusrin Faidz Yusoff JC:

Introduction

[1] This court is presented with a notable case of a borrower who, with open arms, embraced loans structured on Shariah principles. However, this initial joy, a fleeting mirage in the scorching heat of financial need, has since evaporated. This application now stands before this court, not with a spirit of repayment, but with a dagger of legal challenge pointed at the very heart of the agreement. The borrower seeks to declare the charges levied on their land void *ab initio*, arguing the instrument itself violates the very foundation of Shariah principles. We are presented, then, with a tale of two faces: one of initial acceptance, and the other of brazen denial. The question remains – will the borrower succeed in vanquishing the charges, leaving the lender with nothing but the bitter dregs of a broken promise? Let the arguments commence.

Background Facts

[2] The plaintiff borrower applied for and received the following financing facilities from the defendant bank:

(i) term Financing-i facility based on the bai' al-inah principle for the amount of RM892,800 ("first financing facility"); and

(ii) term Financing-i (restructuring) facility based on the murabahah principle (with the application of Tawarruq) for the amount of RM2,665,000 ("second financing facility").

[3] The aforesaid facilities, collectively referred to as the "financing facilities", were based on the following financing agreements (collectively referred to "financing agreements"):

(i) a facility agreement under the bai al-inah principle dated 10 April 2015 ("first facility agreement"); and

(ii) a facility agreement known as the tawarruq Facility (non-cooperative society based) dated 3 November 2021 ("second facility agreement").

[4] It has been agreed between parties that one of the securities for the financing facilities is the creation of Charges Nos. 2890/2010, 5680/2015, and 5681/2015, and 5399/2022 over the plaintiff's following properties:

(i) title No. GM 8511, Lot 16705, Mukim Kapar, Daerah Klang, Negeri Selangor; and

(ii) title No. PM 1989, Lot 44471, Mukim Kapar, Daerah Klang, Negeri Selangor.

[5] After obtaining and utilising the financing facilities, the plaintiff failed to make the agreed-upon payments to the defendant. As a result, on 24 November 2022, the defendant filed a civil suit against the plaintiff at the Kuala Lumpur High Court under Suit No: WA-22M-841-11/2022 ("Suit 841"). The defendant's application for summary judgment was dismissed on 22 August 2023, and Suit 841 is scheduled for a five-day trial commencing 19 August 2024.

[6] Meanwhile, in the exercise of their rights under the charges created, the defendant issued a 16D notice pursuant to s. 254 of the National Land Code 1965 ('NLC') on 28 July 2023 in order to commence foreclosure proceedings against the charged property. This action *in rem* is expected to settle the outstanding sum of RM493,422.55 as at 18 October 2022 under the first facility agreement, and the sum of RM4,166,224.85 as at 18 October 2022 under the second facility agreement.

[7] On 24 August 2023, just two days after the dismissal of summary judgment in Suit 841, the plaintiff filed this originating summons (encl. 1) seeking a declaration to invalidate the charges on their properties. The documents filed for this application are as follows:

(i) plaintiff's originating summons dated 23 August 2023 (encl. 1);

(ii) plaintiff's affidavit is support affirmed by Muhamad Azmi bin Othman on 22 August 2023 (encl. 2);

(iii) defendant's affidavit in opposition affirmed by Nurulaiza binti Nazri on 26 September 2023 (encl. 10);

(iv) plaintiff's affidavit in reply affirmed by Muhamad Azmi bin Othman on 4 October 2023 (encl. 13);

(v) plaintiff's notice to use affidavit dated 26 December 2023 (enclosure seeking reference to Suit 841's affidavits namely:

(a) affidavit in support affirmed by Marinah binti Arshad on 23 May 2023 (encl. 35 in Suit 841);

(b) affidavit in opposition affirmed by Muhamad Azmi bin Othman on 8 June 2023 (encl. 36 in Suit 841); and

(c) affidavit in reply affirmed by Marinah binti Arshad on 22 June 2023 (encl. 37 in Suit 841).

[8] In essence, the plaintiff argues that the charges are linked to the bai al-inah financing facility, which they claim is not compliant with Shariah principles. In contrast, the defendant contends that the facilities include not only bai al-inah but also murabahah facilities, encompassing a larger loan sum. Essentially, the defendant argues that the plaintiff's claim lacks merit and that the court should dismiss the application.

[9] An interim stay of the foreclosure proceedings was granted on 11 October 2023 based on the plaintiff's application in encl. 6. Subsequently, on 14 February 2024, this court dismissed the plaintiff's application in encl. 1, with costs of RM6,000.

Issues

[10] The application addresses the following issues:

(i) do the financing facilities contradict Shariah principles?

(ii) must the court enforce the Shariah Advisory Council's rulings without exercising its own judicial discretion based on statutes and common law?

Do The Financing Facilities Contradict Shariah Principles?

(i) Solicitors' Contentions On Shariah Compliance

[11] The plaintiff's learned counsel, Mugunthan Vadiveloo, argues that the first facility agreement which is based on bai al-inah principles is invalid due to:

(i) the asset sale and asset purchase agreement were executed at the same time *ie*, on 10 April 2015;

(ii) the asset sale and asset purchase agreement contains the prescribed condition to repurchase the asset;

(iii) the asset sale and asset purchase agreement do not identify the subject matter of the agreement;

(iv) the disbursement notice within the asset purchase agreement contains missing items (with places left blank); and

(v) Appendix 1 within the asset sale agreement is left blank *ie*, without any proof of the transacted commodities.

[12] This, according to the plaintiff runs contrary to the rules and guidelines published by the Shariah Advisory Council ("SAC") appointed by Bank Negara Malaysia, as well as the general Islamic principle against gharar (uncertainty) (see: s. 28 and 29 of the Islamic Financial Services Act 2013 ('IFSA 2013'), ss. 56 and 57 of the Central Bank of Malaysia Act 2009 ('CBMA 2009'), SAC rulings issued during its 16th meeting dated 11 November 2000 and 82nd meeting dated 17 February 2009, and the case of *FLH ICT Services Sdn Bhd & Anor v. Malaysian Debt Ventures Bhd* [2016] 1 CLJ 243; [2015] MLRAU (CA) 1 at paras. [25] to [36]).

[13] On the issue of the second facility agreement, the plaintiff claims that the purchase request, the murabahah sale contract and the agency contract (wakalah), were all unexecuted, and therefore raises the issue of gharar (uncertainty) wherein it would be void by virtue of s. 30 of the Contracts Act 1950. Reliance is made on the case of *Maybank Islamic Bhd v. Golden Base Construction Sdn Bhd & Ors* [2019] CLJU 1785; [2019] 1 LNS 1785 wherein the High Court has identified the issue of non-compliance with Shariah principles and refused the plaintiff's application for summary judgment.

[14] On the other hand, the defendant's learned counsel, Ku Amirul Faiz bin Ku Seman, contends that the plaintiff, who owes a substantial amount, is merely trying to evade obligations by challenging the facility's validity. He argues that, under s. 45 of the Evidence Act 1950, the plaintiff is not an expert in Islamic banking and thus lacks the authority to make such a contention.

[15] The defendant contends that the agreements in question are standard for Shariah-based facilities, having been vetted by their internal Shariah advisors and found compliant with SAC rulings. Furthermore, the defendant argues that, according to s. 281 of the IFSA 2013, non-compliance with Shariah principles and SAC rulings does not render the contract void. They cite the case of *Bank Kerjasama Rakyat (M) Bhd v. Koperasi Serbaguna Iman Malaysia Bhd* [2020] CLJU 389; [2020] 1 LNS 389; [2020] MLRHU 331 in support of this argument.

[16] On the issue of the second facility agreement, the defendant claims that the purchase request, murabahah sale contract, and agency contract (wakalah) in question are sample forms contained as appendix in the agreement. The samples are included in Appendix 1 to 3 of the second facility agreement; wherein such document is a mere guide of which terms are to be adopted when preparing the final document.

(ii) Court's Findings On The Issue Of Shariah Compliance

[17] At the outset, there is no complain made or action taken by Bank Negara Malaysia against the defendant based on the alleged breach of Shariah principle. Based on the evidence, objection is made by the plaintiff by way of this originating summons upon being pursued by the defendant based on Suit 841 and the issuance of the 16D notice.

[18] There is no application to cross-examine any witnesses, and also there is no evidence by any Shariah expert to elaborate on the issue of non-compliance as what the plaintiff intends to do during trial of Suit 841. Be that as it may, I find that the rulings of the SAC on the issue have been provided by the plaintiff wherein the same can be referred to in deciding on the objections raised by the plaintiff.

[19] There are nevertheless documents which should have been disclosed by the plaintiff to enable this court to have a better perspective over the matter. The non-disclosed document includes:

(i) documents for the BG-I (1) facility namely the letter of notification dated 4 March 2010; and the al-Kafalah facility agreement dated 1 April 2010; and

(ii) documents for the BG-I (2) facility namely the letter of offer dated 29 May 2014 and AI-Kafalah facility agreement dated 6 May 2015.

[20] Based on s. 56 of the CBMA 2009, I have taken into consideration of the facts, in particular the published rulings of the SAC as presented by the plaintiff in exh. MABO-2 of encl. 2, as well as the allegation of gharar (uncertainty) and/or breach of s. 30 of the Contracts Act 1950 in paras. 12 and 13 of encl. 2. Based on this analysis, I am of the considered view that the published rulings are clear, and there are no further issues that necessitate referring the matter to the SAC for determination under s. 56(1)(b) of the CBMA 2009.

[21] On the issue of sequence of agreement on the first facility agreement, the SAC rulings only require the sale and the purchase contract be executed at a different time. It does not prohibit the akad to be entered on the same day. Based on the time of signing of each document, although both agreements were executed on the same day, I find that the asset sale agreement (exh. MABO-4 of encl. 2) was executed at 10:29AM; whilst the asset purchase agreement (exh. MABO-3 of encl. 2) was executed at 10:35am. As such the said first facility agreement is in compliance with the SAC ruling for it to be executed at different time.

[22] Regarding the concern that the first facility agreement lacks an indication of the subject matter, I believe that the absence of a specific subject matter in the sixth schedule of the asset purchase agreement and the fourth schedule of the asset sale agreement is acceptable, as the facility is not

intended to finance any particular project. Furthermore, the notation "not applicable" in both schedules sufficiently clarifies the matter, thereby eliminating any issue of gharar (uncertainty).

[23] On the issue of the disbursement notice within the asset purchase agreement of the first facility agreement which is said to contain missing items (places left blank), I am of the considered view that such disbursement notice is only a sample to be adopted by the plaintiff. The actual disbursement notice dated 13 May 2015 which was issued under the plaintiff's own letterhead has been provided in exh. MA-7 of encl. 37 of Suit 841.

[24] On the issue of the lack of proof of transacted commodities in Appendix 1 within the asset sale agreement of the first facility agreement, I am of the view that the defendant has sufficiently provided the relevant proof of Bursa Malaysia's commodity transactions in exh. MA-6 of encl. 37 of Suit 841. Therefore, such allegation of gharar (uncertainty) over the issue of commodity is unfounded.

[25] On the issue of incomplete documents being part of the second facility agreement, I am in agreement with the defendant's submissions in that those documents are mere sample within the said master facilities agreement and therefore meant to be as a guide in the preparation of the actual document. Equally, there is no element of gharar (uncertainty) over those "incomplete" document.

[26] Regarding the plaintiff's reliance on the High Court case of *Maybank Islamic Bhd v. Golden Base Construction Sdn Bhd & Ors* (*supra*), I believe that this case can no longer be relied upon, as it has been overturned by the Court of Appeal in *Maybank Islamic Bhd v. Golden Base Construction Sdn Bhd & Ors* (Appeal No. W-02(IM)(MUA)-1035-06-2019). In allowing the bank's appeal, the Court of Appeal applied s. 281 of the IFSA 2013 and held that Shariah non-compliance does not constitute a triable issue in a summary judgment application.

[27] Although I granted unconditional leave to defend in Suit 841, this was done to allow the court to examine the nature of the breach of Shariah principles and determine whether the breach is serious enough to justify the application of ss. 24 and 30 of the Contracts Act 1950. Summary judgment in Suit 841 was also refused due to the triable issue raised regarding the nature of the facilities granted, which led to the defendant bank amending their amended statement of claim.

[28] I am not surprised that there is no contemporaneous report or complaint to the relevant authorities regarding the alleged non-compliance with Shariah principles that would render the facilities void. If the issue were truly significant enough to warrant criminal sanctions, it would have been logical for the plaintiff to file a complaint with the defendant and/or bank

Negara Malaysia upon becoming aware of such non-compliance. Consequently, the plaintiff's current assertion of the defendant's non-compliance with Shariah principles appears to be an afterthought aimed at stalling the foreclosure action against them, as well as a collateral attack to defeat the defendant's claim in Suit 841.

Must The Court Enforce The Shariah Advisory Council's Rulings Without Exercising Its Own Judicial Discretion Based On Statutes And Common Law?

(i) Solicitors' Contentions On The Issue Of Court's Role In Enforcing SAC Rulings

[29] On this issue, the plaintiff relies on the Federal Court's case of *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Bhd; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 5 CLJ 569; [2019] 3 MLJ 561 [FC] at paras. [244] to [246], as well as paras. [323] to [327] to argue that SAC compliance is the overriding factor that determines the validity of a Shariah facility and that the effect of SAC rulings will necessarily be reflected in the order of the High Court on which it binds. It means the determination of the SAC on the issue referred to it becomes enforceable forthwith. Based on this, it is argued that the charges created without complying with SAC rulings can be held to be void *ab initio*.

[30] On the other hand, the defendant argues that the rulings or guidelines published by the SAC should not be the definitive factor. The court retains the authority to interpret and decide how to apply these rulings to the specific facts of each case, using Shariah principles as a guide rather than an absolute directive.

[31] This is so as this case involves the issue of a registered charge under the National Land Code ('NLC') wherein the defendant retains the legal right to foreclose and sell the properties due to the plaintiff's breach of the financing agreements. In essence the defendant argues that the grounds raised by the plaintiff does not amount to "cause to the contrary" that would prevent foreclosure. Reliance is made on s. 256(3) of the NLC, and the Federal Court case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36; [1997] 1 MLJ 77.

(ii) Court's Findings On The Issue Of Its Role In Enforcing SAC Rulings

[32] At the outset, it should be noted that the plaintiff's reference to the case of *JRI Resources Sdn Bhd v. Kuwait Finance House (M) Bhd (President Of Association Of Islamic Banking Institutions Malaysia & Anor, Interveners)* (*supra*) is misleading, as the paragraphs cited in support of their argument reflect the views of dissenting judges. Specifically, paras. [244] to [246] are part of the dissenting judgment of David Wong Dak Wah JCA, while paras. [323] to [327] reflect the dissenting judgment of Richard Malanjum CJ. The relevant majority judgment by Mohd Zawawi Salleh FCJ regarding the effect of the SAC's rulings is reproduced herein:

(1) The "ruling" that was made binding by s. 57 of the 2009 Act was the "ruling" as defined in s. 56(2) of the 2009 Act which was not for a "determination" of dispute between the parties but for the "ascertainment" of the applicable Islamic law "for the purposes of the Islamic financial business". Secondly, the legislature had deliberately, in consonant with item 4(k) of the Federal List in the Ninth Schedule to the FC, employed the words "to ascertain" and not "to determine". Hence, the ruling under s. 57 of the 2009 Act did not conclude or settle the dispute between the parties arising from the Islamic financing facility at hand. It did not "determine" the liability of the borrower under the Islamic facility. *The determination of a borrower's liability under any banking facility was decided by the presiding judge and not the SAC*. (*Mohd Alias Ibrahim v. RHB Bank Bhd & Anor* (refd); and *Tan Sri Abdul Khalid Ibrahim v. Bank Islam Malaysia Berhad* (refd)). (paras 81, 82, 84, 86 & 87)

(2) The SAC did not have any characteristics of judicial power as laid down in the Semenyih Jaya case. The ruling made by the SAC was solely confined to the Shariah issue. *The presiding judge who made reference to the SAC would then exercise his judicial power and decide the case based on the evidence submitted before the court*. Since there was no judicial power vested in the SAC, the SAC did not usurp the judicial power of the court. Furthermore, s. 56(1) of the 2009 Act gave an option to the court or arbitrator whether to take into consideration the published ruling of the SAC or refer the Shariah issue to the SAC for ruling. The word "or" in that section signified that such option was provided to the court or arbitrator. The phrase "take into consideration" in that section implied that only the court or arbitrator had the exclusive judicial power to decide on the case by applying the ruling of the SAC to the facts of the case before them. (paras 108-109)

(3) It was axiomatic that the SAC did not finally dispose of the dispute between the parties. It did not engage in the judicial process of determining the rights of the parties. This was made clear in the Manual issued by Bank Negara called the Manual for References to Shariah Advisory Council by the Civil Court and Arbitrator, which principles had scrupulously been adhered to by the SAC in this case. *Here, the duty to ascertain Islamic law was conferred on the legislature and the SAC was the legislature's machinery to assist in resolving disputes in Islamic banking. It did not exercise judicial power at all*. Therefore, it was open to the legislature to establish the SAC as part of regulatory statute and to vest it with power to ascertain Islamic law for the purpose of banking. (paras 131, 132, 133 & 136)

(4) In the case of a reference made pursuant to s. 56(1)(b) of the 2009 Act, parties involved were allowed to provide their own Shariah expert's views on the Shariah question(s). In the present application, the applicant had provided to SAC its own Shariah expert's view on the issue. (para 152)

(5) The use of expert evidence would not be helpful to a civil court judge as ultimately, the civil court judge would still have to make a decision. In the circumstances, it was for a body of eminent jurists, properly qualified

> in Islamic jurisprudence and/or Islamic finance, to be the ones dealing with questions of validity of a contract under Islamic law and in Malaysia that special body would be the SAC. (paras 157-158)
>
> (emphasis added)

[33] Therefore, it is clear that SAC rulings are confined only to Shariah issues, with the presiding judge retaining the judicial power to decide on the borrower's liability based on evidence and applicable laws.

[34] The law applicable to the contemplated foreclosure proceeding is based on the NLC. Section 241 of the NLC gives banks and financial institutions the power to charge the property subject to the loan, and this shall take effect upon registration of such charge. When there is a charge, the chargee will have a legal interest in the land, while the chargor retains ownership of the land. The chargee will hold the original title to the land and shall return it once the loan has been fully repaid. However, if the chargor has breached any conditions within the charge instrument, the chargee may apply for an order for sale of the charged property.

[35] In *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332; [1994] 1 MLJ 119, the Supreme Court held that a chargee who makes an application for sale under the NLC does not commence an action – he merely enforces his rights as a chargee by exercising his statutory remedy against the defaulting chargor. The chargee therefore does not sue for a debt – his claim for an order for sale is not based on covenant but under the registered charge.

[36] Although there is no statutory definition of the term 'cause to contrary' of s. 256(3) of the NLC, the Federal Court in the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd* (*supra*) provides interpretation of this term; wherein it adopted three categories of cases in which 'cause to the contrary' might be established namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine housed in s. 340 of the NLC;

(ii) when the chargor was able to demonstrate that the charge has failed to meet conditions precedent for making of an application for order for sale; or

(iii) when the chargor was able to demonstrate to the court that the grant of an order for sale would be contrary to any rule of law or equity.

[37] This interpretation of 'cause to the contrary' is said to be too narrow and restrictive. Its restrictive nature was acknowledged by Gopal Sri Ram JCA in *Low Lee Lian v. Ban Hin Lee Bank Bhd* (*supra*) wherein he stated that the rationale behind this narrow interpretation lies in policy reasons. The money that banks lend as loans are funds deposited by their customers, which needs to be recovered promptly. When a borrower defaults in paying back

a loan, the only way to recover the money is *via* the sale of the security charged on that loan. If 'cause to the contrary' is liberally interpreted, banks and financial institutions would lose confidence in their right to recover money this way, and become reluctant to lend money. Given the significant reliance of many businesses on loans, such a scenario would result in numerous adverse economic consequences, which courts would be compelled to prevent.

[38] In the case of *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* [2006] 8 CLJ 9; [2005] 5 MLJ 210, Suriyadi J (as he then was) held that:

> Any transacted Islamic banking business must be presumed to be in order at the outset unless rebutted later. At its inception, so long as the bank genuinely adhered to the very fundamentals of the al-Quran and authentic hadith, *ie* the exact demands of the religion of Islam, and the papers on the face of it were in order, that bank may proceed with the relevant banking transaction. (para 16).

[39] In affirming the interpretation of cause to the contrary in *Low Lee Lian v. Ban Hin Lee Bank Bhd* (*supra*), the High Court in *Arab-Malaysian Merchant Bank Bhd v. Silver Concept Sdn Bhd* (*supra*) held as follows:

> So long as the correct amount was before the court at the final hearing, then the court may dispense with certain minor omissions or errors that do not fall under the category of 'cause to the contrary'. As the sum had remained unchanged, with the error being temporary and merely procedural in nature, let alone the defendant was never prejudiced by those botched references, the court will be unable to agree that this factor sufficed to qualify as 'cause to the contrary'. (para 57)

[40] Although this court has made a finding that the agreements presented before it is Shariah compliant, in the hypothetical event of non-compliance, I am of the view that the court is not bound to follow SAC rulings. A breach of SAC rulings would only impact the validity of the contract if such a breach contravenes applicable finance and banking laws. This is because laws relating to finance and banking matters are included under item 7(j) of the Federal List (List I) in the Ninth Schedule to the Federal Constitution, which is to be governed by statute law and common law (including English law).

[41] Prior to the enactment of the IFSA 2013, cases have demonstrated that chargors could leverage non-Shariah compliance as factors constituting 'cause to the contrary'. (See: *Malayan Banking Bhd v. Ya'kup Oje & Anor* [2007] CLJU 451; [2007] 1 LNS 451; [2007] 2 MLRH 1 (HC)). According to the article titled "*Impacts of the Islamic Financial Services Act 2013 on Investment Account products offered by Islamic Banks in Malaysia*", published in

the International Journal of Management and Applied Research, Vol. 6, No. 4, pp. 317 to 327 (written by Budiman, I K; Abdulaziz, M Jaffar, A and Lo, M T (2019)), prior to the IFSA 2013 there was no clear guidance on managing Shariah non-compliance risk. It is observed by the writers that upon the enactment of the IFSA 2013, remedial measures are suggested.

[42] One of the remedial measures which is aimed at addressing breaches or contravention of in the IFSA 2013 can be found in s. 281 wherein it states as follows:

> Breach or contravention not to affect contract, agreement or arrangement
>
> 281. Except as otherwise provided in this Act, or in pursuance of any provision of this Act, no contract, agreement or arrangement, entered into in breach or contravention of any provision of this Act shall be void solely by reason of such breach or contravention:
>
> Provided that nothing contained in this section shall affect any liability of any person for any administrative, civil or criminal actions under this Act in respect of such breach or contravention.

[43] In *Citranet Sdn Bhd v. Kuwait Finance House (M) Bhd* [2016] CLJU 908; [2016] 1 LNS 908; [2016] 12 MLJ 397, Azizah Nawawi J (as she then was) held that the non-disclosure of the exit fee in the redemption letter which is a breach of Bank Negara's guidelines on product transparency and disclosure issued under s. 135 of IFSA 2013 was a non-issue as s. 281 of the IFSA 2013 clearly provides that any contract entered, which is in breach of the IFSA shall not be void by reason of such breach.

[44] As the provision pertaining to financial institution's duty to comply with Shariah principle and the advice of SAC is within s. 28 of IFSA 2013, it follows that based on s. 281 of IFSA, the non-compliance of such section does not render the banking facility or any instrument thereunder void.

[45] Mohd Johan Lee in his book titled *Islamic Banking in Malaysia*, Lexis Nexis [2017], supports the position that s. 281 of IFSA 2013 preserves the validity and enforceability of a contract even though it is non-Shariah compliant.

[46] In the case of *Bank Kerjasama Rakyat (M) Bhd v. Koperasi Serbaguna Iman Malaysia Bhd* (*supra*), Atan Mustaffa Yussof Ahmad, JC (as His Lordship then was) found that by virtue of s. 281 of the IFSA 2013 any failure to adhere to Shariah principles does not result in the contract being void, invalid, or unenforceable.

[47] It seems that post-2013, the allegation of non-compliance is a matter between Bank Negara Malaysia and each financial institution, perhaps upon a complaint made by a customer. In the event a financial institution or any of its officers failed to adhere to the required Shariah principle, they would be subjected to criminal sanctions (see: s. 28(5) of the IFSA 2013). Yet, as far as s. 281 is concerned, the non-compliance with Shariah principle

"solely" does not invalidate the agreement between parties. Thus, an agreement which goes against SAC rulings need not necessarily be void unless it offends any provisions of the Contracts Act 1950. This may encompass, *inter alia*, whether the underlying reasons for Shariah non-compliance involve factors that could potentially render the contract void on grounds of illegality (s. 24) or uncertainty (s. 30).

[48] Based on the facts of the current case which is litigated in the current mode, I am in agreement with the principles applied in the Court of Appeal's case of *Maybank Islamic Bhd v. M-IO Builders Sdn Bhd & Anor* [2017] 7 CLJ 127; [2017] 2 MLJ 69. Further I apply the cases of *Bank Muamalat Malaysia Bhd & Ors v. Redha Resources Bhd & Ors* [2016] CLJU 1156; [2016] 1 LNS 1156; [2017] 2 MLJ 686, and *Maybank Islamic Bhd v. Golden Base Construction Sdn Bhd & Ors* (W-02(IM)(MUA)-1035-06/2019) (CA), wherein the Court of Appeal have held that applying s. 281 of the IFSA 2013 a breach of Shariah principle alone does not render the existence of a triable issue in an O. 14 application. This court is therefore bound by these decisions, and rule that even if the plaintiff borrower is successful in showing non-compliance of Shariah principle or SAC rulings, such non-compliance would not automatically amount to cause to the contrary under s. 256(3) of the NLC.

[49] Based on the above considerations I am of the view that the SAC's role is limited to providing guidance on Shariah compliance, but it does not have the authority to make binding decisions regarding the financial liabilities of borrowers. This responsibility remains with the presiding judge, who evaluates the evidence and legal arguments presented in the case to make a final ruling on the borrower's liability.

Decision

[50] I have accordingly dismissed the plaintiff's application in encl. 1 with costs of RM6,000.